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MEMORANDUM OF LAW

DATE: September 10, 2009
TO: Honorable Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: Authority to Appoint Members of the Ethics Commission

INTRODUCTION

The San Diego Ethics Commission [Ethics Commission] was created by ordinance of the City Council to advise upon, monitor, administer, and enforce the City's governmental ethics laws. The ordinance provides that the Mayor appoints the seven members of the Ethics Commission, subject to City Council confirmation. This Office has been asked whether the ordinance can be amended to change this appointment process. One proposal would provide that the Mayor, City Council, City Attorney, and members of the public submit names of nominees. A panel of three retired judges would then evaluate the nominees and make the appointments.

QUESTION PRESENTED

Can the ordinance that established the Ethics Commission be amended to give a panel of retired judges the authority to appoint the members of the Commission?

SHORT ANSWER

No. A Charter amendment would be necessary to permit someone other than the Mayor to make appointments to the Ethics Commission.

ANALYSIS

I. Unless Otherwise Provided by the Charter, the Mayor Appoints Members of City Boards and Commissions, Subject to Council Confirmation.

The City Charter provides the authority to establish City boards and commissions and appoint its members. For most boards, the Charter provides that the Mayor make the

appointments, subject to Council confirmation.¹ However, there are a few boards and commissions where the Charter permits others to make the appointments.

A. The Charter Requires that the Mayor Appoint Members of City Boards and Commissions Established Under Charter Sections 41 and 43.

Charter section 41 establishes commissions that are authorized to perform specified duties on behalf of the City. For example, the Funds Commission has “supervision and control over all trust, perpetuity, and investment funds of the City . . .”. San Diego Charter § 41(a). The Civil Service Commission has “supervision over the selection, promotion and removal of all employees of the City subject to the Civil Service provisions of the Charter.” San Diego Charter §§ 41(b) and 115. The Planning Commission has powers and duties prescribed by state law. San Diego Charter § 41(c). The members of all commissions “established” under section 41 are appointed by the Mayor, subject to Council confirmation. San Diego Charter § 41.

The Charter also authorizes the City Council to establish advisory boards by ordinance. San Diego Charter § 43. These boards advise the Mayor, Council or City Manager as designated by ordinance. All members of such boards are appointed by the Mayor with Council confirmation. San Diego Charter § 43(a). Examples of these boards include the Library Commission, Human Relations Commission, Commission for Arts and Culture, Small Business Advisory Board, and the Mission Bay Park Committee. The boards and commissions that are created by ordinance usually are codified in the San Diego Municipal Code.

The Mayor’s authority to appoint members to boards and commissions provided for in Charter sections 41 and 43 remains the same under the Mayor-Council form of governance. San Diego Charter § 265(11).

B. The Charter Authorizes Non-Mayoral Appointments for Certain Boards and Commissions.

The Charter provides some exceptions to the general rule that the Mayor appoints members of boards and commissions, subject to Council confirmation:

Salary Setting Commission. The Salary Setting Commission is charged with recommending the salaries of the Mayor and Council. Its members are appointed by the Civil Service Commission. San Diego Charter § 41.1.

¹ In general law cities, the elected mayor, with the approval of the city council, makes all appointments to boards, commissions, and committees unless otherwise specifically provided by statute. Cal. Gov’t Code § 40605.

Audit Committee. The Audit Committee oversees the City's auditing, internal controls and other financial or business practices. Its members are appointed by the Council and the Mayor has no veto authority over the appointments. San Diego Charter §§ 39.1 and 280(a)(6).

Citizens' Review Board on Police Practices. This Board is authorized to review and evaluate citizens' complaints against members of the San Diego Police Department. The City Manager has exclusive authority to create and establish this board. San Diego Charter § 43(d). Because the Mayor assumed the responsibilities and duties of the City Manager, the Mayor currently makes the appointments to this board. San Diego Charter § 260(b).

Board of Administration of the San Diego City Retirement System. This Board is "the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system." It also has exclusive control of the administration and investment of retirement funds. Seven members are appointed by the Mayor and confirmed by the Council, but additional members are elected by certain classes of retirement system members. One City management employee in the administrative service is appointed by the City Manager. San Diego Charter § 144.

Accordingly, the Mayor must appoint members of City boards and commissions established under Charter sections 41 and 43, subject to Council confirmation. The Charter provides other appointment authority for certain boards and commissions established under other sections.

II. The Charter Requires that the Mayor Appoint Members of the Ethics Commission, Subject to Council Confirmation.

The Ethics Commission was established by ordinance of the Council on June 5, 2001, and codified in the San Diego Municipal Code. SDMC §§ 26.0401 *et. seq.* The Commission's responsibilities include educating City officials, providing advice to all persons under its jurisdiction including City elected officials, reviewing its own procedures and suggesting changes for City Council approval, and investigating and enforcing violations of local governmental ethics laws. SDMC § 26.0404. The Mayor appoints members of the Commission from nominees submitted by the Council and the City Attorney. The City Council confirms those appointments. SDMC § 26.0404.

The ordinance establishing the Ethics Commission does not reference the legal authority for its creation. However, our Office previously advised that the Council has authority under Charter section 43 to establish the Commission. In a report to the Committee on Rules, Finance,

and Intergovernmental Relations, we advised: "Although the City Council has broad authority pursuant to San Diego Charter section 43 to establish boards and commissions, Charter section 43 does not give the Council the authority to grant subpoena power to a board or commission." City Att'y Report 01-4 (Feb. 6, 2001).

Based on our advice that a Charter amendment was necessary to provide the Commission with subpoena authority, the Council placed a measure on the March 2002 ballot. The measure approved by the voters amended Charter section 41 to add subdivision (d):

(d) Ethics Commission. For so long as an Ethics Commission remains established by ordinance of the Council, the Executive Director of the Commission shall be appointed by the Commission, subject to confirmation by the Council, and shall thereafter serve at the direction and pleasure of the Commission. The Commission may, in accordance with complaint and investigation procedures approved by ordinance of the Council, subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records, or other items material to the performance of the Commission's duties or exercise of its powers.

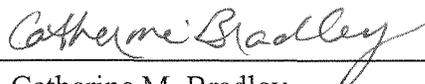
This section acknowledges that the Commission was "established by ordinance," a process consistent with Charter section 43. However, the Commission was added to Charter section 41, which includes commissions with duties that are more than advisory. One interpretation is that the voters ratified the establishment of the Commission under Charter section 41. However, we need not resolve that issue to answer the pending question. Whether the Commission was established under Charter section 43 or 41, the Charter requires Mayoral appointment of Commission members, with Council confirmation.

The Charter provides the appointment authority for boards and commissions. The Council cannot adopt an ordinance that is contrary to the Charter. "[I]t is well settled that a charter city may not act in conflict with its charter" and that "[a]ny act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994). An ordinance that transfers the authority to make those appointments to someone other than the Mayor would conflict with the Charter and be void.

CONCLUSION

The City Council may not adopt an ordinance that is contrary to the City Charter. Thus, it cannot adopt an ordinance that gives someone other than the Mayor the power to make appointments to the Ethics Commission. If the Council wishes to change the appointment process, it must do so through a Charter amendment.

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